



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 1361 OF 2014

LEONARD GITAU KIROCHO.....PLAINTIFF

VERSUS

FRANCIS IRUNGU NJOROGE.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 23rd October 2014 in which the Plaintiff/applicant seeks for an order of temporary injunction restraining the Defendant whether acting by himself or through his agents, servants and/or workers and/or anybody claiming any right or interest through him from trespassing onto and or getting into the Plaintiff's parcel of land known as Land Reference Number 27627/65 situated in Utawala area in Nairobi (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, Leonard Gitau Kirocho, sworn on 23rd October 2014 in which he averred that he is the registered owner of the suit property pursuant to a Letter of Allotment issued in the year 2005 by Kandara Development Company Limited for valuable consideration. He then averred that in the year 2010 he received information that the Defendant/Respondent had trespassed onto and settled on the suit property. He added that on 1st September 2010, the Defendant appeared before the directors of Kandara Development Company Limited and the area Chief where he was informed that he was encroaching and trespassing on the suit property and he promised in writing to vacate within 6 months. He further averred that his advocate Mr. G.M. Muhoro wrote to the Defendant on 1st November 2012 informing him that to immediately vacate the suit property. He stated that despite this and a previous demand to vacate the suit property, the Defendant has refused to comply and has not stopped the trespass to date. On those grounds, he sought for the court to allow this Application.

The Application is contested. The Defendant, Francis Irungu Njoroge, filed his Replying Affidavit sworn on 23rd July 2015 in which he averred that the suit property was sold to his late grandmother Margaret Waithira Kimani by Stephen Njoroge in the year 1995. He added that after his grandmother died, he was bequeathed the suit property with the knowledge of Kandara Development Company Limited which was the registered owner of the suit property. He further averred that he has been in occupation of the suit property from the year 2005 and it is the only home that he and his family know. He then stated that the Plaintiff is seeking to evict him out of the suit property at an interlocutory stage without affording him and opportunity to be heard. On those grounds he sought for this Application to be dismissed with costs.

In response thereto, the Plaintiff filed his Supplementary Affidavit sworn on 7th September 2015 in which he insisted that the suit property is his having obtained the same from Kandara Development Company Limited pursuant to a Letter of Allotment issued in the year 2005. He made reference to the letter from his advocate G.M. Muhoro dated 22nd August 2013 which confirmed his ownership of the suit property. He denied that the Defendant has been in occupation of the suit property since the year 2005, stating that he only moved into the suit property sometimes in May 2010. He further stated that the Defendant himself promised to vacate the suit property in six months by a letter dated 1st September 2010. He concluded by stating that despite that promise and his efforts to peacefully evict the Defendant, he has remained defiant and continues to remain in occupation of the suit property to date.

The issue arising out of this Application for determination is whether or not to issue the order of temporary injunction. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted

unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must mention to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

This court notes that the Defendant has been in occupation of the suit property for a number of years. According to the Plaintiff, the Defendant entered the suit property in the year 2010 and this suit having been filed in the year 2014, the Defendant had been in occupation for about 4 years. On the part of the Defendant, he claims to have entered the suit property in the year 2005 which amounts to about 9 years before this suit was filed. Overall, it is quite clear that we are dealing with a case where the Defendant has been in occupation of the suit property for a number of years. In these circumstances, the order of temporary injunction sought by the Plaintiff in this Application actually and effectively amounts to an order of eviction at the interlocutory stage. As cited above, in an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law. This court finds that it cannot issue the eviction order at this interlocutory stage of these proceedings. This issue must be considered and determined by the trial court after a full hearing has been held. The Application is therefore dismissed. Costs shall be in the cause.

It is so ordered.

SIGNED AND DATED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 19TH DAY OF JUNE 2018

MARY M. GITUMBI

JUDGE

DELIVERED AT NAIROBI BY JUSTICE BERNARD EBOSO THIS 21ST DAY OF JUNE 2018

BERNARD EBOSO

JUDGE